(b) all hire-rent due and unpaid at the date of termination of the agreement;

(c) the sum due under a minimum payment clause or a depreciation clause provided that such sum is a reasonable pre-estimate of liquidated damages and not a penalty.

Where there is no such clause, or the clause is unenforceable as imposing a penalty, the owner may sue for damages for loss of profit resulting from the termination. The measure of damages will normally be the unpaid balance of the hire-purchase price less:—

(i) the value (or if sold, the proceeds of sale) of any goods repossessed;

(ii) any fee payable for the exercise of the option to purchase (since the hirer was not obliged to exercise the option); and

(iii) a discount for the acceleration of payment — that is, a deduction to take account of the fact that the owner has become entitled immediately to a lump sum in damages instead of having to accept instalment payments as he would have done if the agreement had run its proper course."

Applying the principles of law which I have discussed, I do not see how I can avoid the conclusion that the plaintiffs' claim must succeed. To use the words of Lord Macnaghten in *Helby* v. *Matthews*,[10] "this was an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable." In the event of the defendant being in arrears in instalments the plaintiffs were entitled to terminate the agreement, and in the event of the hiring being so terminated the defendant was to remain liable to the plaintiffs for arrears of rent up to the date of termination. Admittedly, the defendant was in arrears of five instalments. As I have already stated, the termination of the hiring by the plaintiffs was not invalid. I have found it as a fact that it was after 18th May, 1965 that the defendant ceased to be in possession of the payloader. The letter dated 10th June, 1965 by the plaintiffs to the defendant was ample notice of the fact that the hiring was being terminated or had been terminated. By this letter the plaintiffs gave the defendant an opportunity to repay the arrears of instalments and take back the payloader. Instead of availing himself of this opportunity, the defendant caused his solicitors to write back to the plaintiffs to say that he was prepared to pay all arrears only if they could return the machine to him in good and workable condition.

The fact that by selling the payloader for $18,940 the plaintiffs have recovered more than they are claiming from the defendant is beside the point. The payloader was their property all along, they retook possession of it lawfully and thereafter they were entitled to do what they liked with it. As they are not claiming damages for breach of the hire-purchase agreement, they are not liable to account for the amount which they realised by selling it. I appreciate that it may be considered hard and unjust on a hirer if the hire-purchase agreement is terminated after he has paid a major portion of the hire-purchase price, but there is nothing unlawful in the owner enforcing his rights under the contract if the hirer is in fact in breach of the agreement. The sort of situation which arises in such a case is something which only Parliament can remedy. So long as the rights of the parties rest in common law and are not modified by the legislature, cases of this nature will continue to give rise to righteous indignation and the courts will have no power to grant any relief. That is exactly the situation here.

I have rejected the rather novel proposition of law put forward on behalf of the defendant that he was not liable to pay the instalments for the period during which he was deprived of the use of the machine when it was undergoing repairs. The machine was repaired from time to time and returned to him. It was ready for him on 25th May, 1965 when it had been last repaired, but he failed to take delivery of it. The claim for $2,348.86 in respect of goods supplied is admitted. The defence that he is not liable to pay the amount claimed in respect of repairs because the bill for such repairs was delivered to him after the plaintiffs had retaken possession of the payloader, even though it is not denied that such repairs were in fact carried out before the date of repossession, is both puerile and fatuous. As regards the counterclaim, it must fail because there was no breach of agreement on the part of the plaintiffs. Accordingly, there will be judgment for the plaintiffs on the claim for $13,342.09 with interest thereon as prayed. The counterclaim is dismissed. The defendant must pay the plaintiffs' costs of the action.

Judgment for the plaintiffs.

Solicitors: *Shearn, Delamore & Co.; Skrine & Co.*

GAN CHWEE LEONG v. NEW INDIA ASSURANCE CO. LTD.

[A.C.J. (Ismail Khan J.) November 25, 1967]
[Malacca — Civil Appeal No. 17 of 1966]

Insurance — Motor insurance — Claim for damages — Insurers settling claim — Whether insured liable to reimburse.

The appellant was insured with the respondents against third party risks in respect of a motor van. On July 18, 1964 the van was involved in an accident with a third party. In breach of condition 4 of the insurance policy the appellant failed to give notice of the accident to the respondents who only came to know about the accident when they received a letter from the solicitors of the third party three months after the accident. On October 29, 1964 the respondents by letter informed the appellant of the breach of this condition and without prejudice to their rights under the policy submitted a claim form to the appellant. The appellant returned the form duly completed giving, *inter alia*, an account of the accident. On November 6, 1964 the respondents wrote to the appellant informing him that the solicitors for the third party were claiming a sum of $1,157.50 and stating that the claim was not payable by

them "in view of the breach of policy condition" and requested the appellant to forward them the amount claimed to enable them to finalise the matter with the solicitors for the third party. The respondents received no reply despite several reminders. By their letter of December 24, 1964 the respondents informed the appellant that "should we be called upon to pay any amount to satisfy statutory liability, we reserve the right of recovering the same from you in view of the breach of the policy condition. . . . If we do not receive any confirmation from you within a period of 7 days . . . we will take it for granted that you are agreeable to the above details." They then settled the claim by payment of a sum of money with a complete denial of liability. The respondents then commenced proceedings and obtained judgment. On appeal:—

Held: (1) the liability of the appellant was complete as soon as the accident occurred;

(2) the respondents were within their rights in effecting a settlement "in the common interest of themselves and the insured";

(3) in this case there was no evidence of any undertaking by the appellant to repay the respondents any money which they were liable to pay under the policy to the third party;

(4) as the terms of the contract had been reduced to writing in the policy, the respondents could not found their claim on a *quasi-contract.*

Cases referred to:—

(1) *Hood's Trustees* v. *Southern Union General Insurance Company of Australasia Ltd.* [1928] 1 Ch. 793.

(2) *Groom* v. *Crocker* [1939] 1 K.B. 194.

(3) *Beacon Insurance Co. Ltd.* v. *Langdale* [1939] 4 All E.R. 204.

MAGISTRATE'S CIVIL APPEAL.

Denis Murphy for the appellant.

Arul Chandran for the respondents.

Cur. Adv. Vult.

Ismail Khan J.: This is an appeal against the decision of the learned magistrate allowing the respondents' claim for the sum of $700 paid by them to the use of the appellant.

The circumstances giving rise to the action are these. The appellant was the owner of a motor van No. MA 5470 and was insured against third party risks by a policy with the respondents. On 18th July, 1964, at 4.10 p.m., the motor van was involved in an accident at Sungei Udang Road, Malacca, with a third party. The policy contained, *inter alia,* the following three conditions:—

"*Condition No. 4:* In the event of an occurrence giving rise to a claim under the policy of insurance the defendant should as soon as possible give written notice thereof to the plaintiffs, with full particulars, addressed to the plaintiffs, direct at one of their registered addresses in Malaya and Singapore, which addresses were set out in the said policy.

"*Condition No. 5:* The company shall be entitled if it so desires to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim.

"*Condition No. 10:* The due observance and fulfilment of the terms of this policy insofar as they relate to anything to be done or not to be done by the defendant shall be conditions precedent to any liability of the plaintiffs to make any payment under this policy."

The appellant in breach of condition 4 failed to give notice of the accident to the respondents. The first intimation the respondents had of the accident was a letter from the solicitors for the third party three months after the accident. On 29th October, 1964, the respondents by letter informed the appellant of the breach of this condition of the policy and without prejudice to their rights under the policy submitted a claim form for the appellant. The latter returned the form duly completed giving, *inter alia,* an account of the accident. On 6th November, 1964, the respondents wrote to the appellant that the third party solicitors were claiming a sum of $1,157.50. The letter also stated that:—

"The claim is not payable by us in view of the breach of policy condition, in view of your failure to report this accident to us and we would therefore request you to forward us your cheque for $1,157.50 to enable us to finalise this matter with the third party lawyers."

The respondents received no reply despite several reminders. By their letter dated 24th December, 1964, the respondents informed the appellant that:—

"Should we be called upon to pay any amount to satisfy statutory liability, we reserve the right of recovering the same from you in view of the breach of the policy condition as already advised earlier. Kindly acknowledge and confirm having noted the contents of this letter. If we do not receive any confirmation from you within a period of 7 days from the date of this letter, we will take it for granted that you are agreeable to the above details."

The respondents then commenced proceedings and obtained judgment.

Briefly, the contention of the appellant at the hearing of this appeal was that the respondents were under no obligation to make payment to the third party, until it was established that the appellant was under a legal liability to pay him. In this case it was said that there was no judgment against the appellant nor any other evidence of his liability at the trial except the correspondence between him and the respondents and the document P.13 setting out the terms of settlement with the third party. It appears from P.13 that the settlement was with a complete denial of liability. It was further argued that the payment to the third party was a voluntary payment by the respondents which was not binding on the appellant.

With regard to the first point, the liability of the appellant was complete as soon as the accident occurred. See *Hoods' Trustees* v. *Southern Union General Insurance Company of Australasia, Ltd.*[1] The third party's claim in respect of his injuries were set out in the respondents' letters to the appellant. The respondents had in the claim form submitted by the

appellant at their request a history of the accident, and in negotiating for a settlement of the third party claim they were acting on the authority contained in condition 5 of the policy. The effect of such a provision as in condition 5 was considered in the case of *Groom* v. *Crocker*.(2) There, Sir Wilfrid Greene said at p. 196:—

"The effect of the provisions in question is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they *bona fide* consider to be the common interest of themselves and their assured."

Although his Lordship was speaking only of the conduct of the proceedings, in a later case, *Beacon Insurance Co. Ltd.* v. *Langdale* (3) these observations were held to be equally applicable to the settlement of claims by the insurers.

The facts of *Beacon's* case are similar to the present one. The appellant had insured with the respondents against third party risks. His motor cycle was involved in a collision with a cyclist who claimed damages. The appellant filled up the usual claim form giving an account of the accident and sent it to the respondents. The policy contained a term that "the company shall have full discretion in the conduct of any proceedings or in the settlement of any claim". The respondents settled the cyclist's claim without notice to the appellant and against his view of the rights in the matter. Slesser L.J. said:—

". . . . the insurance company behaved at all times with complete propriety. They drew the attention of the assured, on the claim form itself, to the terms of the contract. They made what they believed to be, in his interest and theirs, an advantageous settlement, and they were at pains to show that the settlement should be made with a denial of liability."

The same could be said of the respondents in this case. They were within their rights in effecting a settlement "in the common interest of themselves and the insured".

The next point for consideration is whether they could call on the appellant to reimburse them for money paid to third party. This must depend on the terms of the contract between the parties. The proviso to section 78 of the Road Traffic Ordinance says:—

"Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

There is no evidence of any undertaking by the appellant to repay the respondents any money which they were liable to pay under the policy to the third party. The policy was never put in as an exhibit.

The only terms of the contract disclosed are:—

(1) An agreement by the respondents to indemnify the appellant (subject to certain conditions on the policy) in the event of an accident caused by or arising out of the use of the appellant's motor vehicle No. MA 5470 against all sums which the appellant should be legally liable to pay to third parties. This appears in paragraph 3 of the statement of claim.

(2) Conditions 4, 5 and 10 set out in paragraph 4 of the statement of claim.

Only these were admitted in the defence.

In *Beacon's* case there was evidence of a condition in the policy whereby the insured agreed with the insurance company that he should be liable to pay the first £5 (or any less amount for which the claim may be settled) of each claim arising under the policy on or before a certain date, which expression "claim" shall mean a claim or series of claims arising out of one cause.

As Slesser L.J. observed:—

"Once it is conceded, or found, that the respondents have the power to settle the claim, the event which is contemplated in this provision has arisen. There has been a settlement, and under the terms of the policy he is thereupon liable to pay the first £5 for which the claim has been settled."

The respondents never pleaded that it was a term of the contract that the appellant should reimburse them. On the contrary, the claim was for money paid to the use of the appellant. It was argued that there was a *quasi-contract*. The terms of the contract having been reduced to writing in the policy, I cannot see how the respondents could found their claim on a *quasi-contract*.

The appeal is allowed. The judgment of the learned magistrate is set aside. The appellant will have the costs here and in the court below.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Rodyk & Davidson.*

LEE CHEE PHENG & ANOR. v. LEE CHEE POOI & ORS.

[O.C.J. (MacIntyre J.) December 4, 1967]
[Ipoh — Civil Suit No. 550 of 1966]

Mining — Agricultural titles converted into mining certificates — Certificates for a period of 10 years — Failure to renew certificates — Land reverting to State — New certificate granted on new application by some of original co-lessees — Whether new holders holding certificate as trustees for all original co-lessees.

Lee Koo, the father of the plaintiffs and defendants in this case, died possessed of a half undivided interest in the agricultural holdings now comprised in mining certificate No. 3713. After his death his estate was distributed among the beneficiaries who consisted of 5 sons — the plaintiffs and defendants herein — a widow, three daughters and a grand-daughter. Their respective shares totalling the undivided half interest in the said lands were registered in the proportions agreed to by them under a deed of family settlement. Later the agricultural titles were converted into mining certificates for a 10 year period expiring on August 20, and September 18, 1960, respectively.